Supreme Court, U.S.
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No. 99-1205

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES S. OWSLEY, et al.,
Petitioners,

v.

SAN ANTONIO INDEPENDENT
SCHOOL DISTRICT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This case involves the fact-bound application of a settled legal standard. The courts below were asked to decide whether Petitioners, eight licensed athletic trainers in the State of Texas, are eligible for one-and-one-half times their regular rate of pay for hours worked in excess of 40 hours per week, under the Fair Labor Standards Act ("FLSA"). The Court of Appeals upheld Respondent's affirmative defense that the Petitioners were employed as *bona fide* professionals and, therefore, were exempt from the FLSA.

In answering this question, the Court of Appeals properly relied upon the now widely recognized and accepted "short test" to determine whether the Petitioners are employed as *bona fide* professionals. 29 C.F.R. §§ 541.3(e), 541.315. According to the "short test," Respondent need only establish that Petitioners' primary duties consisted of:

1. The performance of work requiring knowledge of an advanced type in a field of science or learning acquired through a prolonged course of specialized intellectual instruction; and

2. The consistent exercise of discretion and independent judgment.

Paul v. Petroleum Equip. Tools Co., 708 F.2d 168, 170-71 (5th Cir. 1983). In resolving this fact-intensive dispute, the appellate court carefully considered informal opinion letters generated by a regional office of the Wage and Hour Division in cases involving the application of the same legal standard to different facts. After "weigh[ing] carefully" these letters, and considering them "persuasive" evidence of the

appropriate application of the standard, the court ultimately concluded that the letters were not helpful in this case because they were factually "inapposite." Court of Appeals Opinion, Petitioners' Appendix A, at 7a-7b. The remainder of the opinion in this case involves the unremarkable application of a settled legal standard to stipulated facts.

A. Petitioners Misstate Their Job Duties and Responsibilities

In their Statement of the Case, Petitioners misstate the stipulated and undisputed evidence presented to the District Court. Specifically, they describe their job duties and responsibilities as basically clerical and menial in nature. They focus on tasks such as "routine injury treatment," "application of heat and ice," "taping," "monitoring practices," processing "insurance paperwork," and "maintaining the training room," and present them as the essence of their work. Petition, pages 3-4.

The summary judgment evidence, however, clearly establishes that Petitioners' job duties and responsibilities were more consequential. For example, the Petitioners treated and evaluated injured student athletes, selected and implemented rehabilitation technique and therapies, and ultimately determined if and when an injured student athlete could return to practice or play. (R. 263-64, DX 11, pages 52:5-54:20; pages 226:14-227:2; pages 266:21-268; pages 268:611-17; DX 14, pages 60:19-23; pages 74:21-118; DX 18, pages 45:3-53:15; pages 656:7-92:6; DX 31, pages 63:13-16; pages 64:9-66:6). In particular, the Court of Appeals observed that "...the trainers are expected to (1) establish specific procedures to be carried out by a coach and/or student trainer in the event of an emergency when care of an athlete is needed; (2) be responsible for communication with

parents, physicians, coordinating trainer, and coaches concerning injured athletes; and (3) determine the athlete's return to practice or playing status, following an athletic injury." Petitioners' Appendix A, at 10a. Applying the second prong of the well-established "short test" to this evidence, the Court of Appeals concluded that the trainers' work "requires consistent exercise of discretion and performance." Similarly, applying the first prong of the settled standard to the stipulated evidence, the Court of Appeals concluded that Petitioners meet the "learned" requirement of the exemption standard. Petitioners' Appendix A. Absolutely nothing about this everyday legal characterization of stipulated facts warrants an exercise of this Court's discretionary jurisdiction.

B. Petitioners Misinterpret the Court of Appeals' Treatment of the "Knowledge" Prong of the Short Test

Petitioners assert that the Court of Appeals made "offhand and factually inaccurate" distinctions regarding the 1993 regional opinion letter. Petition, page 5. Moreover, Petitioners allege that this "offhand and factually inaccurate" distinction prevented the Court of Appeals from affirming the trial court's judgment. *Id.* A review of the Court of Appeals' opinion reveals that it made no such inaccurate distinction.

Petitioners correctly note that the trainers in the 1993 regional office opinion letter were required to have "at least one course in seven specific areas" (Petitioners' Appendix H, at 75a), but fail to establish the significance of this point. As the Court of Appeals noted, Petitioners have conceded that degrees in corrective or physical therapy, or degrees that focus on athletic training or sports medicine, clearly meet the first prong of the "learned" short test. Petitioners' Appendix,

at 6a, n. 3. Instead, Petitioners focus on the most permissive requirements: achievement of a baccalaureate or post-baccalaureate degree and three semester hours in five specified areas of course work.

Petitioners then claim that the "Court of Appeals committed a serious factual error in its reading of the 1993 DOL Opinion Letter by concluding that the trainers involved in the DOL scenario had fewer academic requirements than those in Texas." Petition, page 6. The Court of Appeals drew no such conclusion. The Court of Appeals did observe that the Kansas athletic trainers did not have a credit-hour requirement similar to the fifteen credit hours required in Texas. Put differently, Texas athletic trainers must, by statute, take three hours in each of five areas: (a) human anatomy; (b) health, disease, nutrition, fitness, wellness, or drug and alcohol education; (c) kinesiology; (d) human physiology or physiology of exercise; and (e) athletic training, for a total of fifteen hours. The 1993 regional opinion letter implies that, in Kansas, the academic requirements can be satisfied through the "acquisition of at least one course in seven specific areas." Petitioners' Appendix, at 75a. Whatever the analysis, the Kansas requirements are not statutorily mandated. Respondent submits that the Court of Appeals did not commit a "serious factual error" in its reading of the 1993 regional opinion letter.

Moreover, in order for Petitioners' theory to have practical impact, they must convince the Court that the regional opinion letters would have been dispositive. As set forth at Sections I and II, *infra,* the regional opinion letters are not entitled to *Chevron* deference and, therefore, are not controlling upon the Court of Appeals' considered judgment. Even if the regional opinion letters were entitled to *Chevron* deference, they speak to different facts and circumstances and,

again, do not have bearing on the instant case.

ARGUMENT

I.

RATHER THAN CONSIDERING THE INFORMAL AGENCY OPINION LETTERS, RELATING TO ENTIRELY DIFFERENT SETS OF FACTS, AS BINDING AUTHORITY, THE COURT OF APPEALS CORRECTLY TREATED THEM ONLY AS PERSUASIVE EVIDENCE.

This Court has never embraced the *carte blanche* approach the Petitioners advocate: automatic, reflexive deference to any and all agency interpretations of governing regulations. According to Petitioners' reasoning, deference would be required of the courts, without regard to the source of the agency interpretation, whether it is well-reasoned, and regardless of whether the interpretation is that of the agency head, or meant to set forth guiding principles for the public. A careful reading of the cases cited by Petitioners reveals that the Court has never intended such a conclusion, nor have the circuit courts of appeals adopted such an approach.

This Court long ago set forth guiding principles for the lower courts in determining whether to defer to an agency interpretation of its own regulations, and the degree of deference which would be appropriate, in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In *Skidmore,* the Court had before it an action, as in this case, to recover overtime compensation, liquidated damages, and attorney's fees. *Skidmore* at 135. In discussing whether to accord deference

to the Administrator of the Wage and Hour Division's interpretative bulletins and informal rulings, the Court stated:

> The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy.... The fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect. This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin.
>
> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.
>
> ...The evidence in this case in some

> respects...is different. Each case must stand on its own facts.

Skidmore, supra, at 139-40.

Accordingly, the degree of deference to be accorded an agency's interpretation of a statute Congress has charged it with administering varies, depending on several factors, including the existence of a statute mandating a standard of review, the form and formality of the interpretation, and the consistency of the agency's interpretation over time. *Wolpaw v. Comm'r of Internal Revenue,* 47 F.3d 787, 790 (6th Cir. 1995). Although Petitioners describe the Court of Appeals' action as "categorical denial of deference to any agency interpretation" (Petition, page 13), the court clearly considered the opinion letters presented to the District Court. (Petitioners' Appendix A, page 7a). The Court of Appeals stated that the two opinion letters are to be "weighed carefully" and are entitled to "great deference" if they state a reasonable conclusion. *Id.* Thus, the Court of Appeals' analysis and consideration of the opinion letters are consistent with this Court's teachings in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984); *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410 (1945), and in *Skidmore, supra.*

Two opinion letters were presented by Petitioners to the District Court. (Petitioners' Appendix H). The two letters were written by personnel in a regional office of the Wage and Hour Division of the Department of Labor in 1968 and 1992, respectively. Respondent has been unable to locate either of these two opinion letters through any published resource, and Petitioners introduced the two opinion letters through affidavits.

Petitioners have also included in their Appendix H a third opinion letter, dated August 24, 1998. This opinion letter, by its date, was not in existence either at the time Petitioners' case was filed or at the time the district court entered summary judgment. Indeed, it is not clear whether the Court of Appeals even considered this third opinion letter, since it was submitted to the Court of Appeals only a few days prior to oral argument. This opinion letter, from the Office of Enforcement Policy, contains significant and specific limitation language:

> This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

Petitioners' Appendix H, pages 81a-82a. By its terms, then, the 1998 Wage and Hour Division opinion letter proffered by Petitioners is specifically limited to the facts presented, and cannot be relied upon or offered as presenting the agency's "final word" or authoritative view on the matter.

As an additional point, Petitioners seek to misdirect this Court's attention by arguing that interpretive regulations need not be promulgated pursuant to Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553. Petition, page 20. That assertion, while true, has no bearing on this case. The issue here is not the applicability of Section 553, but, rather, the level of judicial deference appropriate for informal opinion letters. Petitioners' reliance on *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), is equally misplaced. Petition, page 22. In the present case, the Court of Appeals obviously did not seek to impose additional procedures on an agency engaged in Section 553 rulemaking. To the contrary, it simply declined to extend *Chevron* deference to informal, fact-specific opinion letters. This decision is in keeping with fundamental principles of administrative law. "Whatever practical or psychological impact [interpretative rulings] may have, their legal effect is only that of opinions of the agency. Interpretative rules are thus accorded less deference than substantive rules." BERNARD SCHWARTZ, ADMINISTRATIVE LAW 182 (3rd ed., 1991) (footnotes omitted).

II.

WHILE A CONFLICT MAY BE EMERGING AMONG THE COURTS OF APPEALS OVER THE APPROPRIATE LEVEL OF DEFERENCE DUE AGENCY INTERPRETATIONS OF THEIR OWN REGULATIONS, THE CONFLICT DOES NOT INVOLVE THE APPROPRIATE TREATMENT OF FACT-SPECIFIC, NON-BINDING OPINION LETTERS OR INFORMAL OPINION LETTERS GENERATED BY REGIONAL OFFICES OF ADMINISTRATIVE AGENCIES, SUCH AS THE ONES AT ISSUE IN THIS CASE.

Petitioners argue that this case presents an opportunity to resolve a "deep split" among the Courts of Appeals. It does not, for three reasons. First, as discussed *infra*, in the Statement of the Case and Section III, the judgment below is premised on the court's conclusion that the opinion letters were addressed to a factually distinct situation, and, therefore, would not be relevant even if deference were appropriate for such informal, fact-bound opinion letters. Second, this Court has already provided ample guidance to the lower courts concerning the circumstances under which deference may be accorded agency interpretations of their own regulations. The "deep split" that the Petitioners claim to have identified is actually the fruitful discussion of the lower courts, through which they will refine this Court's guiding principles in the application thereof. Further engagement by the lower courts will either resolve the issue presented in the Petition (but not really raised in this case), or at least crystallize an important issue of law for consideration by this Court. Finally, and

most importantly, all of the cases on which Petitioners rely involve relatively high-level agency interpretations of ambiguous regulatory phrases, not regionally issued opinions, or non-binding advisory opinions, concerning the application of a clear legal standard to specific, but different, facts.

This Court's statements on the issue of deference to agency interpretations of their own regulations make clear the importance of the source and substance of the interpretation for which deference is sought. For example, Petitioners rely heavily on *Auer v. Robbins,* 519 U.S. 452 (1997), as a case in which the Court endorsed deference to agency interpretations of their own regulations. *Auer,* however, deals not with a regional agency office letter opinion, and not with a fact-bound opinion limited to the facts presented, but with the Secretary of Labor's interpretation of the FLSA statute as regards "salary basis." *Id.* at 461-62. In *Auer,* the Secretary was resolving ambiguities in his own regulations, not applying his interpretations to a specific set of facts. *Id. Pension Benefit Guaranty Corp. v. LTV Corp.,* 496 U.S. 633, 642 (1990), likewise deals with opinion letters providing the agency's interpretation of pension termination programs and its power to make restoration decisions. *Id.* at 648. Similarly, *Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.,* 513 U.S. 251 (1995), an appeal of a denial by the Comptroller of the Currency of a bank's application to sell annuities, discussed deference owed to a 1978 letter by the Assistant Director of the Office of the Comptroller of the Currency, declining to afford deference to a letter which did not purport to represent the Comptroller's position. *Id.* at 263.

Although the Seventh Circuit has observed that the deference to be provided agency opinion letters "is unresolved," *Commonwealth Edison Co. v. Vega,* 174 F.2d

870, 875 (7th Cir. 1999), *cert. denied,* ___ U.S. ___, 120 S. Ct. 176 (October 4, 1999), the case by no means points to a clear and significant conflict among the circuits which must be resolved by the courts. Judge Posner's quotation in *Vega*, highlighted by Petitioners (Petition, page 15), is merely dicta in a case dealing primarily with issues of Eleventh Amendment immunity. Indeed, the court declines even to discuss the deference to be given, if any, to the opinion letters presented in that case. *Id.* at 875. In another case, Judge Posner acknowledged, as did the Fifth Circuit in this case, that agency interpretations are entitled to "some measure of judicial deference [citations omitted] even when expressed informally, in a letter or brief." *Morton Community Unit Sch. Dist. No. 709 v. J.M.*, 152 F.3d 583 (7th Cir. 1998), *cert. denied,* ___ U.S. ___, 119 S. Ct. 1140 (1999). In declining to afford deference to the opinion letters at issue, Judge Posner found that the Department's interpretation was not "definite or precise," and the description was "inaccurate." Further, he categorized the opinion letters as "evasive." *Id.* at 585. Thus, where an opinion letter is not helpful to the court, or is inapplicable, deference cannot be accorded that particular agency interpretation.

While Petitioners state that the Third Circuit has weighed in on the side of *Chevron* deference to agency opinion letters, that Circuit again discusses "varying degrees of deference...based on such factors as timing and consistency of the agency's position, and the nature of expertise." *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 692-93 (3rd Cir. 1994). The *Reich* court states, "[s]uch weight need not be given, however, when the interpretations are, like these, inconsistent, not contemporaneous to the enactment of the statute, and stale." *Id.* at 692. *Reich* further states that "full deference is appropriate to the extent the opinion letters have common ground." *Id.* at 693, n. 9.

Petitioners have cited cases from four other circuits which clearly involve head-of-agency opinion letters, none of which appear to contain the limiting language of the 1998 Wage and Hour Division letter offered by Petitioners: *Thorson v. Gemini, Inc.*, 123 F.3d 1140 (8th Cir. 1997); *Frank v. McQuigg*, 950 F.2d 590 (9th Cir. 1991); *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164 (11th Cir. 1988); and *Hicks v. Cantrell*, 803 F.2d 789 (4th Cir. 1986). Indeed, the opinion letter in *Frank v. McQuigg, supra*, was requested of the Department of Labor by the National Association of Letter Carriers, to provide guidance in the very factual situation before the court. *Frank, supra*, at 593-94.

While Petitioners state that the Fifth, Sixth, and Tenth Circuits "have refused to give *Chevron* deference to agency opinion letters," Petitioners' Brief, page 17, an analysis of the cited cases shows, instead, a careful consideration by those courts of the source and substance of each such opinion letter, to determine whether the particular letter should be accorded *Chevron* deference. In *Kilgore v. Outback Steakhouse of Florida, Inc.*, 160 F.3d 294 (6th Cir. 1998), the court noted that *Chevron* deference is not accorded "non-binding advisory opinions" of an administrative agency. *Kilgore* at 302. Citing, again, *Skidmore, supra*, the *Kilgore* court found no persuasive value in opinion letters which it did not deem to be "thoroughly considered and well-reasoned." *Id.* at 303. *See also, Southern Ute Indian Tribe v. Amoco Production Co.*, 1199 F.3d 816, 832-35, *rev'd on other grounds*, 119 S. Ct. 1719 (1999) (extensive discussion of *Skidmore* and *Chevron* analysis to be applied to agency opinions).1

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1 This Court has granted certiorari in one case cited by Petitioners in their briefing concerning the District of Columbia

Petitioners have referred the Court to no case in which a low-level agency official rendering an advisory opinion, or a non-binding opinion letter, has been accorded *Chevron* deference. Following the guidance and analysis provided by this Court in *Chevron, Skidmore,* and *Seminole Rock,* the Court of Appeals correctly considered, but gave no *Chevron* deference to, the opinion letters at issue here.

III.

THIS CASE DOES NOT WARRANT AN EXERCISE OF THE COURT'S DISCRETIONARY JURISDICTION, BECAUSE THE OPINION BELOW STANDS, INDEPENDENTLY, ON THE CONCLUSION OF THE COURT OF APPEALS THAT THE OPINION LETTERS OFFERED IN SUPPORT OF PETITIONERS' LEGAL ARGUMENT ARE FACTUALLY INAPPOSITE.

As shown in Respondent's response to Petitioners' Statement of the Case, *supra,* the facts of the three opinion letters offered by Petitioners differ substantially and

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Circuit's views on *Chevron* deference. *United States v. Hubbell*, 167 F.3d 552 (1999), *cert. granted,* ____ U.S. ____, 120 S. Ct. 320 (October 12, 1999) (No. 99-166). *Hubbell*, however, is a criminal case involving the scope of the delegated powers of the Independent Counsel. Issues of *Chevron* deference are only tangentially related to the issues before this Court in *Hubbell*, and this case is readily distinguishable from the issue of deference to the Department of Justice's Special Division's interpretations of grants of authority to appoint independent prosecutors, 28 U.S.C. § 593.

significantly from the facts of the athletic trainers before this Court. The Court of Appeals made specific reference to the 1993 opinion letter, noting that "it does not even deal with the same facts as those in the case *sub judice.*" Petitioners' Appendix A, page 8a. Therefore, the exercise of this Court's discretionary jurisdiction is unwarranted in this instance.

IV.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE PETITIONERS ENGAGED IN THE PERFORMANCE OF WORK REQUIRING KNOWLEDGE OF AN ADVANCED TYPE IN A FIELD OF SCIENCE OR LEARNING ACQUIRED THROUGH A PROLONGED COURSE OF SPECIALIZED INTELLECTUAL INSTRUCTION.

Petitioners allege that, because of the Court of Appeals' non-deferential approach to DOL interpretations of the question before the Court, it improperly abandoned the requirement that an exempt "professional" employee under the FLSA must generally have earned a specialized degree. Petition, page 23. Petitioners again rely upon their false premise that the regional opinion letters are entitled to *Chevron* deference and that they are germane to the inquiry. Neither of these assumptions is reasonable.

The Court of Appeals, if anything, engaged in a well-reasoned and methodical approach to evaluating the Petitioners' educational backgrounds, noting that Petitioners had obtained specialized training. Petitioners' Appendix, pages 5a-9a. In addition to the aforementioned degree requirement, Petitioners completed an athletic training

apprenticeship totaling 1,800 hours in three years under the direct supervision of an on-campus licensed athletic trainer. 25 TEX. ADMIN. CODE § 313.5(b)(I)(B)(iii) (West 1999). Petitioners also took and passed an examination consisting of written questions and an oral demonstration. TEX. REV. CIV. STAT. ANN. art. 4512d, § 5 (Vernon 1999); 25 TEX. ADMIN. CODE § 313.13. Finally, Petitioners are required, by regulation, to complete thirty clock hours of continuing education during each three-year period. 25 TEX. ADMIN. CODE § 313.13(b).

Respondent demonstrated to the Court of Appeals that Petitioners share many similarities with other professionals deemed exempt by operation of case law or other legal authority. (R. 360; DX 28, 33, 34); 29 C.F.R. § 541.301(e)(1); *Hofer v. Federal Cartridge Corp.*, 71 F. Supp. 243 (D.C. Minn. 1947) (statutory exemption for registered nurses); 29 C.F.R. § 541.306 (statutory exemption for medical technologists); *see also* 29 C.F.R. § 541.314(c). In fact, Petitioners share professional characteristics similar to those of physical therapists, in that both professions are required to regularly evaluate the conditions of patients and rehabilitate injuries. (R. 258; DX 28, page 4; DX 34, pages 1-2; R. 360); TEX. REV. CIV. STAT. ANN. art. 4512e, *et seq.*; *see also* 22 TEX. ADMIN. CODE §§ 321, *et seq.*; *see also* Tex. Att'y Gen. LO-92-6. Relying upon its prior reasoning in *Paul v. Petroleum Equipment Tools Co., supra,* the Court of Appeals properly concluded that, "[t]he trainers' educational background is akin to the training requirements this court found sufficient to meet the 'learned' prong for the airline pilots in *Paul*." Petitioners' Appendix A, pages 8a-9a.

In addition to the regional office opinion letters, Petitioners rely heavily upon the Eleventh Circuit's decision in *Dybach v. State of Florida Dep't of Corrections*, 942 F.2d

1562 (11th Cir. 1991). In *Dybach*, the court determined that probation officers were not exempt professionals because they were required to possess an undergraduate degree without requiring any specialized course work. *Id.* at 1564. In fact, the employer admitted that a degree in "nuclear physics...physical education, or basket weaving" would suffice. *Id.* at 1565. In Texas, the applicable statute requires specialized course work, an apprenticeship, passing a licensing exam, and continuing education requirements, factors far more demanding than those in *Dybach*. TEX. REV. CIV. STAT. ANN. art. 4512d, *et seq.*; 25 TEX. ADMIN. CODE §§ 313, *et seq.* Observing these differences, the Court of Appeals correctly held, "[Unlike *Dybach*]...in which the claimants were not required to take any specific college courses to qualify for their job, the trainers must take a specified number of specialized courses directly related to their professional duties in sports medicine and athletic training." Petitioners' Appendix A, at 8a. Thus, *Dybach* is easily distinguishable.

CONCLUSION

For the reasons set forth herein, the Court should deny Petitioners' Petition for Writ of Certiorari in its entirety and affirm the judgment of the United States Court of Appeals for the Fifth Circuit, which reversed and rendered the judgment of the United States District Court for the Western District of Texas, San Antonio Division.

Dated: February 18, 2000

Respectfully submitted,

/s/_____
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